U.S. Department of Labor

Office of Administrative Law Judges
John W. McCormack Post Office and Courthouse
Room 505
Boston, MA 02109

(617) 223-9355
(617) 223-4254 (FAX)

Issue Date: 07 May 2004

CASE NO.: 2003-LHC-1747
OWCP NO.: 1-136562

In the Matter of

LAWRENCE A. BESTWICK
Claimant

v.

ELECTRIC BOAT CORPORATION
Employer/Self-Insured

APPEARANCES:

Robert B. Keville, Esquire, Suisman, Shapiro, Wool, Brennan, Gray & Greenberg, P.C.
New London, Connecticut for the Claimant

Peter D. Quay, Esquire (Murphy & Beane),
New London, Connecticut for the Employer and Carrier

Before: COLLEEN A. GERAGHTY
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

This proceeding arises from a claim for workers' compensation benefits filed by Lawrence Bestwick, a longshoreman, against Electric Boat Corporation ("Electric Boat") under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq. (the "Act"). After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs ("OWCP"), the matter was referred to the Office of Administrative Law Judges ("OALJ") for a formal hearing. A hearing was conducted before me in New London, Connecticut on October 20, 2003, at which time all parties were afforded the opportunity to present evidence and oral argument. The Claimant appeared at the hearing represented by counsel, and an appearance was made by counsel on behalf of the Employer. The parties offered stipulations, and testimony was heard from the Claimant. Documentary evidence was admitted without objection as Claimant's Exhibits ("CX") 1-11, Employer's Exhibits ("EX") 1-7, Joint Exhibit ("JX") 1 and ALJ Exhibits ("ALJX") 1-4.

Hearing Transcript ("TR") 10-11. At the close of the hearing, the record was held open for the parties to submit additional deposition testimony and exhibits. TR at 41-43. The Claimant subsequently submitted the deposition of Dr. Anne Hebert marked as Claimant's Exhibit (CX 12). The Employer offered the deposition of Dr. Michael Teiger, marked as Employer's Exhibit (EX 8) and a subsequent report by Dr. Teiger identified as Employer's Exhibit (EX 9). Neither party objected to the post-hearing exhibits and those exhibits have been admitted into evidence. Thereafter, the parties filed briefs. The record is now closed.

After careful analysis of the evidence contained in the record, the parties' stipulations and their closing arguments, I have concluded that the claimant suffered a compensable lung injury which arose out of his employment at Electric Boat and that he is, therefore, entitled to an award of permanent partial disability compensation with interest on unpaid compensation, medical benefits and attorney fees. My findings of fact and conclusions of law are set forth below.

II. Parties' Stipulations and Issues Presented

The parties stipulated to the following facts: (1) the Longshore Act applies; (2) the injury occurred prior to December 22, 1995;(3) the injury arose in the course and scope of employment; (4) an employer/employee relationship existed at all relevant times; (5) the notice, claim and controversion of the claim was timely; (6) the informal conference was held on February 5, 2003. TR at 5-7; JX 1.

The following issues are presented: (1) whether the Claimant's lung impairment is causally related to his employment at the shipyard; (2) whether the Claimant is entitled to compensation benefits under either Section 8(c)(21) or Section 8(c)(23) of the Act .

III. Findings of Fact and Conclusions of Law

A. Background

The Claimant is sixty-eight years old. He worked at Electric Boat from 1962 until his retirement on December 22, 1995. TR at 16. The Claimant worked as a grinder, grinding metal and cleaning up after the welding process. TR at 17-18. In performing his duties the Claimant testified that he was required to grind and cut asbestos insulation off of the pipes on the ship. TR at 18. This activity created airborne dust and the Claimant stated that respirators were not provided "back then." TR at 19. The Claimant also testified that he worked in areas where the laggers worked covering pipes with asbestos insulation. TR at 19-20. The Claimant estimated that he was exposed to asbestos for a period of five to seven years. Id.

The Claimant stated that he retired from Electric Boat in December 1995 because the company was offering a retirement incentive which the Claimant referred to as a "golden handshake." TR at 17-18. He testified that approximately a week or two prior to his retirement date an x-ray taken by Electric Boat as part of the exit physical examination indicated a spot on his lung and he was referred to his own physician. TR at 22. The Claimant testified that he reported his asbestos exposure to the Yard Hospital his last day of work based upon the x-ray findings. TR at 23.

The Claimant reported that prior to his retirement he would become short of breath on walking up hill, going up and down stairs, and sometimes using his tools. TR at 23-24. After being advised to see his personal physician by the shipyard, the Claimant sought treatment from his physician, Dr. Job Sandoval. TR at 24; CX 4. Dr. Sandoval diagnosed pleural thickening. CX 4. The Claimant eventually consulted Dr. Anne Hebert a pulmonary specialist on February 9, 2001. CX 2. Dr. Hebert performed a Pulmonary Function Test (PFT) on February 21, 2001. She has prescribed inhalers on a daily basis. TR 28-29. As a result of the pulmonary function tests she has ordered and reviewed, as well as other diagnostic tests, Dr. Hebert stated that the Claimant has a permanent lung impairment and she has assessed a 25% permanent impairment. CX 2. Dr. Hebert has also stated that part of the Claimant's lung impairment is a result of his asbestos related pleural disease caused by his asbestos exposure at Electric Boat. CX 2; CX 12 at 10-13.

The Claimant is a smoker. He has smoked for over forty years and smoked 1 to 2 packs per day. TR at 24-25. He testified that he has been unsuccessful in several attempts to quit smoking, but that he has now reduced his smoking to 8-10 cigarettes per day. TR at 26. The Claimant testified that his lung condition has continued to worsen over time. He stated that he now experiences difficulty walking more than 75 yards, he is unable to walk a golf course and must take a cart when he plays, and he is short of breath after climbing four to five stairs or when he exerts himself. TR 26-27, 31-32.

B. Causation

An individual seeking benefits under the Act must, as an initial matter, establish that he suffered an "accidental injury…arising out of and in the course of employment." 33 U.S.C. §902(2). In determining whether an injury arose out of and in the course of employment, the Claimant is assisted by Section 20(a) of the Act which creates a presumption that a claim comes within its provisions. 33 U.S.C. §920(a). The Claimant establishes a prima facie case by proving that he suffered some harm or pain and that working conditions existed which could have caused the harm. *Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS 140 (1991); *Murphy v. S.C.A./Shayne Brothers*, 7 BRBS 309 (1977) *aff'd mem*. 600 F.2d 280 (D.C. Cir. 1979); *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 (1981). In presenting his case, the Claimant is not required to introduce affirmative evidence that the working conditions in fact caused his harm; rather, the Claimant must show that working conditions existed which could have caused his harm. *U.S. Industries/Federal Sheet Metal, Inc., v. Director, OWCP (Riley),* 455 U.S. 608 (1982). In establishing that an injury is work-related, the Claimant need not prove that the employment-related exposures were the predominant or sole cause of the injury. If the injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resulting disability is compensable. *Independent Stevedore Company v. O'Leary,* 357 F.2d 812 (9th Cir. 1966); *Rajotte v. General Dynamics Corp.,* 18 BRBS 85 (1986).

Once a claimant establishes a prima facie case, the Claimant has invoked the presumption, and the burden of proof shifts to the employer to rebut it with substantial evidence proving the absence of or severing the connection between such harm and the employment or working conditions. *Merrill*, 25 BRBS at 144; *Parsons Corp. of California v. Director, OWCP,*

619 F.2d 38 (9th Cir. 1980); *Butler v. District Parking Management Co.*, 363 F. 2d 682 (D.C. Cir. 1966); *Kier v. Bethlehem Steel Corp.,* 16 BRBS 128 (1984). If the presumption is rebutted, it no longer controls, and the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 196 U.S. 280 (1935); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18 (1995); *Sprague v. Director, OWCP,* 688 F. 2d 862 (1st Cir. 1982).

In the present case, the Claimant relies upon the opinion of Dr. Anne Hebert, who reported that the Claimant has asbestos related pleural plaques and moderately severe obstructive airway pathology. CX 2 at 2; CX 12 at 10-13, 15-16. While acknowledging that the Claimant's extensive smoking history contributed to his chronic obstructive pulmonary disease ("COPD"), Dr. Hebert stated that "asbestos exposure did result in some degree of respiratory impairment." CX 2 at 2. Dr Hebert testified that as a result of his exposure to asbestos, the Claimant has pleural disease as demonstrated by the presence of pleural plaques in his lungs. CX 12 at 7. The Employer concedes that the Claimant has established a prima facie case showing that his lung impairment could have resulted from his exposure to asbestos at Electric Boat. Emp. Br. at 3. Therefore, the Claimant has successfully invoked the presumption of causation. Accordingly, the question then becomes whether the Employer has rebutted the prima facie showing of causation.

In evaluating an employer's attempt to rebut the Section 20(a) presumption, an employer must produce substantial evidence that the condition was not caused or aggravated by the claimant's employment. *Bath Iron Works Corp. v. Director, OWCP* 31 BRBS 19 (1st Cir.1997); *James v. Pate Stevedoring Co.* 22 BRBS 271 (1989). Evidence is "substantial" if it is the kind that a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). Under the substantial evidence standard, an employer need not establish another agency of causation to rebut the presumption, it is sufficient if a physician unequivocally states to a reasonable degree of medical certainty that the harm suffered by the worker is not related to employment. *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39, 41-42 (2000); *Kier v. Bethlehem Steel Corp*. 16 BRBS 128 (1984). The employer is not required to "rule out" the connection between the injury and employment in order to rebut the presumption. *Bath* I*ron Works Corp.*, 31 BRBS at 21; See also *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 289 (5th Cir. 2003) (rejecting requirement that the employer "rule out" causation or submit "unequivocal" or "specific and comprehensive" evidence to rebut the presumption and reaffirming that the "evidentiary standard for rebutting the § 20(a) presumption is the <u>minimal</u> requirement that an employer submit only 'substantial evidence to the contrary.'").

In the instant case, the Employer points to the opinion of Dr. Kenneth Kern in its effort to rebut the presumption of causation. Dr. Kern performed a records review of the Claimant's medical records. EX 5. Based upon that review, Dr. Kern diagnosed chronic obstructive pulmonary disease secondary to smoking, mild asbestos-related pleural plaque disease, asymptomatic, and no evidence of asbestos-related, restrictive parenchymal disease. EX 5 at 1. At his deposition, Dr. Kern explained that pleural plaques is a inflammatory response to the fibers of asbestos. EX 7 at 7. Dr. Kern stated that the Claimant's chronic obstructive pulmonary disease was more likely that not caused by smoking tobacco. EX 7 at 8. Dr. Kern also stated that the restrictive component of the Claimant's lung disease was more likely caused by the

Claimant's weight rather than from asbestos exposure. EX 7 at 10. Dr. Kern opined that it was "more likely than not that asbestos did not contribute to any degree of respiratory impairment." EX 7 at 13-14. He concluded that the Claimant's pulmonary function studies and his clinical picture can be explained by his smoking and by his body mass. Id. However, Dr. Kern also acknowledged that the Claimant has pleural fibrosis in parts of his lung. EX 7 at 40. On cross-examination, Claimant's counsel conceded smoking as a contributing factor in the Claimant's lung impairment, and he then asked Dr. Kern whether the Claimant's pleural fibrosis and decreased pulmonary function play any role in his respiratory impairment. Dr. Kern replied, stating "I don't think I could rule out any role." EX 7 at 43. While the Employer argues that it is not required to rule out work-related asbestos exposure as a contributing factor, the Claimant did not ask Dr. Kern to do so in this case. Emp. Br. at 3-4. Rather, the Claimant sought the doctor's view as to whether the asbestos-related pleural fibrosis had any role at all in the Claimant's respiratory impairment.

The Employer also submitted the reports and deposition of Dr. Michael Teiger who is board certified in internal medicine and pulmonary diseases. EX 4 at 4-5. Dr. Teiger reviewed the Claimant's medical records and examined the Claimant in December 2002. In his January 2, 2003 report, Dr. Teiger states that the Claimant does have pleural plaques, worse on the left lung than on the right, but he states that the Claimant does not have asbestos related parenchymal lung disease. EX 4 at 4, 5. Dr. Teiger also indicated that while he agreed with Dr. Hebert's assessment that the Claimant's COPD was the result of his smoking, he did not agree with her assessment that the restrictive portion of the Claimant's lung disease resulted from asbestos exposure. *Id.* Rather Dr. Teiger indicated that the restrictive component of the lung disease was due "primarily" to his excess weight. *Id*.. Dr Teiger explained that the Claimant suffers from diffuse pleural plaques, which involve small sections of the lung, rather than circumscribed plaques. EX 8 at 11-13. He stated that pleural plaques do not cause disability. EX 8 at 11. Dr. Teiger opined that "none of [the Claimant's] respiratory impairment is due to his asbestos exposure and [he] believes that [the Claimant's] restriction is entirely due to his weight and not asbestos pleurisy. " EX 4 at 4-5.

The statement by Doctor Teiger that the Claimant's lung disease was not related to his exposure to asbestos while employed at Electric Boat is substantial evidence sufficient to rebut the presumption of causation. *O'Kelley*, 34 BRBS at 41-42; *Kier*. 16 BRBS 128. Therefore, the presumption falls out of the case and the Claimant must establish by a preponderance of the evidence that his lung disease was caused or aggravated, at least in part, by his employment at the shipyard.

Dr. John Foster a radiologist, interpreted the Claimant's diagnostic study as showing "pleural thickening on the left" with a "parenchymal scar which is pleurally based." CX 6 at 20. A later study in March 1996 interpreted by Dr. Jay Duxin, also a radiologist, shows "extensive pleural thickening" and a "pleural based scar" that had not changed significantly since the earlier study. CX 6 at 19.

Consistent with the earlier studies interpreted by Dr. Foster and Dr. Duxin, a CT scan performed on January 11, 2001 at the request of Dr. Hebert reflects "bilateral anterior pleural calcifications and minimal fibrotic linear scarring" of the "left upper lobe and lateral segment of

the right middle lobe" of the Claimant's lungs. CX 2 at 4. As a result of the diagnostic testing, which indicated pleural plaques or thickening including one area that had calcified, as well as, the presence of an area of pleural scarring, Dr. Hebert concluded that the Claimant has occupationally-induced asbestos pleurisy, moderate chronic obstructive pulmonary disease attributable to smoking, mild post-inflammatory pulmonary fibrosis, and mild obstructive sleep apnea. Id.; CX 12 at 5-7. Dr Hebert found both obstructive and restrictive components to the Claimant's lung disease. Dr. Hebert stated that given the Claimant's asbestos exposure and the objective radiographic evidence of asbestos pleurisy, dating back to 1996, the Claimant's obstructive airway pathology was attributable to tobacco use, obesity-related chest wall restriction and to asbestos exposure. CX 2 at 2; CX 12 at 11-12.

On behalf of Electric Boat, Dr. Teiger reviewed the Claimant's x-rays and serial CT scans and examined the Claimant. His report indicates that those diagnostic studies show the presence of "bilateral pleural thickening" more significant in the Claimant's left lung than the right. EX 4 at 4. Contrary to Dr. Hebert's opinion, Dr. Teiger states that he does not appreciate any clear calcification in the area of thickening of the Claimant's left lung. Id. In addition, Dr. Teiger's report does not indicate that he observed scarring of the lung after reviewing the Claimant's CT scans. In his deposition, Dr. Teiger was reluctant to state that he agreed with Dr. Foster's interpretation of the CT scan as showing scarring without looking at the film. EX 8 at 28-29. He noted that his own report did not comment on a parenchymal scar and he stated that sometimes scarring and pleural thickening "seem to melt together on a film." EX 8 at 29. Nonetheless, Dr. Teiger acknowledges significant unprotected asbestos exposure from the Claimant's employment at Electric Boat and he further acknowledges that the pleural abnormalities observed on chest x-rays and CT scans are consistent with asbestos related pleural plaques. EX 4 at 5. Consistent with Dr. Hebert's opinion, Dr Teiger states that the Claimant's pulmonary function tests reflect both an obstructive and restrictive lung deficit. Id. Although he agrees with Dr. Hebert's opinion that the Claimant's obstruction is due to COPD from smoking, he disagrees that the restrictive component is due partly to asbestos pleurisy. Instead, Dr. Teiger opines that the restriction is due "primarily" to the Claimant's excess weight. Ibid. In this regard, I note that at one point in his report Dr. Teiger states "[t]he pleural abnormality on the left is not at all large and is not calcified and I think that it is very unlikely that it would be the cause [sic] any restrictive ventilatory deficit." EX 4 at 5. Later on in his report, Dr Teiger's opinion becomes more definitive as he states "I personally believe that <u>none</u> of his respiratory impairment is due to his asbestos exposure and believe that his restriction is due entirely to his weight and not asbestos pleurisy." *Id.* (*emphasis in original*). Dr. Teiger's opinion in this regard, is difficult to square with his deposition exchange with counsel for the Claimant:

> Q: Using the analogy of a balloon, which is a rough analogy to what a lung is, if I were to take a balloon and pinch a portion of it, that would be functionally what a scar might do, is that correct?
>
> A: It's not a bad analogy.
>
> Q: And if you then fill up the balloon and I was to pinch it, although it may not dramatically effect the overall volume of that balloon, it would necessarily have to effect it in some degree, negligible or otherwise, is that a fair statement?

A: I think that's fair.

Q: And functionally, essentially, that is what occurs with the lung with parenchymal scarring. While it may not have dramatic effect, if there is scarring on the surface of the lung, it restricts the amount of lung expansion. It will in some degree effect lung volume, is that correct regardless of how negligible?

A: Your comment has to be considered correct. But there is a point of what's important medically and what's not.

Q: I can appreciate that. I'm not disputing that point. I'm really talking in absolutes here.

A: Then I would agree that your statement is correct.

EX 8 at 29-30. During this exchange, Dr. Teiger acknowledges that scarring of the lung can affect lung function as it restricts the amount of lung expansion, even though he notes that the impact on lung function may not be medically important. Under the Longshore Act, the Claimant is not required to show that employment-related exposures were the predominant or sole cause of the injury. It is enough if the Claimant establishes that the injury was caused or contributed to by employment at the shipyard. *Independent Stevedore Company,* 357 F.2d 812; *Rajotte,* 18 BRBS 85.

Pleurisy is an inflammation of the lung membrane. EX 8 at 20-21. As it progresses the inflamed surfaces of the pleura can become united by adhesions. In the instant case, there is no dispute among the physicians that the Claimant has pleurisy and pleural plaques or pleural fibrosis caused by asbestos exposure. Dr. Teiger testified, based upon his review of the diagnostic tests, that the Claimant has areas of diffuse pleural thickening and an area of circumscribed pleural plaques. EX 8 at 11-13, 23-25. Dr. Teiger stated that circumscribed pleural plaques are typically seen with asbestos-related pleural plaques as opposed to diffuse pleural thickening which was his primary observation. *Id.* However, he also stated that the presence of diffuse pleural thickening did not exclude the possibility that asbestos contributed to the development of the pleural fibrosis. In addition, with regard to the area of circumscribed pleural thickening that he did observe, Dr. Teiger agreed that the presence of circumscribed area of pleural fibrosis is an accurate indicator of asbestos-related pleural disease. EX 8 at 23-26. Dr. Teiger's findings do not reflect the presence of pleural scarring. However, Dr. Teiger explained that scarring and pleural thickening can melt together on a film. EX 8 at 29. In light of the fact that two radiologist have interpreted two different CT scans performed in 1995 and 1996 as showing areas of scarring on the Claimant's lung, and the fact that the report from the Claimant's treating physician, includes the finding of scarring on a third CT performed in January 2001, the weight of the evidence establishes that the Claimant's pleural fibrosis includes areas of scarring.

With regard to Dr. Kern's opinion, I note that he is a surgical oncologist and not a pulmonary specialist. EX 7 at 5. Dr. Kern did not examine the Claimant, he simply performed a records review. EX 7 at 26. Dr. Kern's testimony with regard to whether the Claimant had

diffuse pleural thickening appears to be inconsistent with Dr. Teiger's testimony on this point. EX 7 at 39-41; EX 8 at 11-12, 22-24. In addition, Dr. Kern stated that his opinion that it was more likely than not that the claimant's asbestos-related pleural plaque disease did not contribute to his respiratory impairment was based in part upon his understanding that the Claimant did not experience shortness of breath with activity. He acknowledged at his deposition that the medical records he reviewed indicated that the Claimant did suffer shortness of breath with activity. EX 7 at 31, 32, 33, 38-39, 48. On balance, given the fact that he is not a pulmonary specialist, that he did not examine the Claimant, and that some of the assumptions regarding the Claimant's clinical status which he used to support his opinion were incorrect, I accord less weight to his opinion.

Both Dr. Hebert and Dr. Teiger are well qualified and specialists in pulmonary medicine.[1] Both physicians agree that the Claimant's smoking and weight contribute to his lung impairment. The doctors disagree as to the role the Claimant's asbestos pleurisy plays in his lung impairment. Dr. Hebert's opinion that the asbestos pleurisy contributes, in part, to the Claimant's lung condition is based upon the objective radiographic evidence of asbestos pleurisy dating back to 1996 and the undisputed fact that the Claimant had unprotected exposure to asbestos. CX 2 at 2. Dr. Hebert explains that "asbestos exposure can result in fixed airway pathology, which progresses over time, independent of cigarette use." Id. Dr. Teiger does not disagree with Dr. Hebert's diagnosis of asbestos pleurisy, but he initially opines that the restriction is caused "primarily" by weight. EX 4 at 5. Dr. Teiger notes that the Claimant is moderately overweight and he states that the pleural abnormality on the left lung is not large or calcified and it is "very unlikely that it would be the cause of a restrictive ventilatory deficit." Id. Later in the same report, Dr. Teiger opines that "none" of the Claimant's respiratory impairment is attributable to asbestos pleurisy. EX 4 at 5.

On balance, as the treating physician, Dr. Hebert has had an opportunity to examine, treat and observe the Claimant's condition in a clinical setting over a longer period than Dr. Teiger who reviewed medical records and examined the Claimant once for this case. Although acknowledging that the Claimant's past extensive smoking and his weight contribute to his lung impairment, Dr. Hebert's unequivocal opinion that the Claimant's asbestos pleurisy contributes, in part, to his current lung impairment is supported by objective clinical findings. I have found that the evidence shows that the Claimant's pleural fibrosis included scarring of the lung. Even though Dr. Teiger qualified his statements, Dr. Teiger's acknowledgment that scaring of the lung can affect the amount of lung expansion and lung volume also calls into question his statement that none of the Claimant's respiratory impairment results from his pleural abnormalities or asbestos pleurisy. Therefore, I accord greater weight to Dr. Hebert's opinion and I find that the Claimant has established by a preponderance of the evidence that his lung impairment is caused or contributed to by his exposure to asbestos at the Electric Boat shipyard.

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[1] Dr. Hebert attended Colby College, Dartmouth Medical School, and Brown University for internal medicine and pulmonary medicine training. CX 12 at 4. She is board certified in pulmonary medicine and has been in practice for at least fifteen years. Dr. Teiger is board certified in internal medicine and pulmonary medicine. EX 8 at 4-5. Dr. Teiger has been in practice for several years and he has taught in the clinical program at the University of Connecticut Health Center since 1991.

C. Entitlement to Compensation

The parties' raise several issues with regard to the Claimant's entitlement to compensation benefits. As an initial matter, the parties' disagree as to the correct statutory provision for determining the compensation benefit. Claimant contends that he is entitled to compensation under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), which sets forth the method of compensating claimants for lost wages attributable to the injury. Cl. Br. at 14. In support of his position that Section 8(c)(21) is the applicable statutory provision, the Claimant contends that "while he was still employed at Electric Boat he became aware of an injury to his lungs and he was experiencing a functional limitation as a result of this injury." Cl. Br. at 13-14.[2] The Claimant stated that a few months after his retirement, he began working part-time approximately 25 hours a week, from March until Thanksgiving as a groundskeeper at a local golf course. TR 30-32. Therefore, the Claimant asserts that he is entitled to compensation under Section 8(c)(21) of the Act for the loss of wage-earning capacity between the Electric Boat position and the part-time groundskeeper job. Cl. Br. at 14-15. In the alternative, the Claimant contends that should Section 8(c)(23) be determined the appropriate section for determining compensation, reading Sections 8(c)(23) and 10(d)(2)(A) together, the claim occurred within the first year after retirement, so the average weekly wage shall be 1/52nd part of the annual earnings during the 52 week period preceding retirement. Cl. Br. at 15-16. Under this formula, the Claimant contends that the stipulated average weekly wage was $966.14, representing the applicable average weekly wage. Cl. Br. at 16. Asserting that the permanent impairment rating is 50%, the Claimant contends that the compensation rate would be $498.07 (50% x $966.14) payable as of the date of the initial functional capacity evaluation of February 21, 2001. *Id.*

In contrast, Electric Boat contends that as a "voluntary retiree" whose disability became manifest only after his retirement, any compensation due the Claimant must be calculated pursuant to Sections 8(c)(23) and 10(d)(2) of the Act, 33 U.S.C. §908(c)(23) and §910(d)(2), which address the method for calculating compensation benefits for employees who have retired and suffer from an occupational disease. Emp. Br. at 5-6, 17-19. However, the Employer further contends that the Claimant is not entitled to any compensation under these statutory provisions because he works part-time at a golf course and cannot establish that he is now retired. Emp. Br. at 7-10, 17-19. Alternatively, the Employer argues, that should a compensation award be made pursuant to Section 8(c)(23), the permanent impairment ratings of Drs. Kern, Teiger and Hebert should be averaged for a permanent impairment rating of 16.67%. Emp. Br. at 19. The Employer asserts that the first pulmonary function study used to arrive at the impairment rating was February 21, 2001, more than one year after the Claimant's retirement. Id. Therefore, the Employer argues that pursuant to subparagraph (B) of Section 10(d)(2) the applicable average weekly wage is the national average weekly wage for the date of injury which is $466.91. Emp. Br. at 19.

In resolving the issues and addressing the parties' various arguments, I consider first the issue of whether Section 8(c)(21) or 8(c)(23) applies in determining the method of compensation. Resolving this issue requires answering the question of whether the Claimant is a

[2] The Claimant's brief does not include page numbers. I have numbered each page in sequence in order to make an accurate citation to the arguments presented in the Claimant's brief.

voluntary retiree or whether he left his job at Electric Boat because he was no longer able to perform the job duties. The Claimant testified unequivocally that he retired from Electric Boat because he took the "golden handshake" meaning that the Employer was offering to add an additional five years of service to an employee's time served which increased the amount of the Claimant's retirement pension. TR at 17-18, 34, 40-41. Although the Claimant testified that he was experiencing shortness of breath with some activities before he retired, he did not state that he retired because he was unable to perform his job. TR at 23-24. The Claimant testified that he consulted his physician, Dr. Sandoval, after the nurse at Electric Boat informed him that an x-ray, taken as part of a pre-retirement physical examination, showed a spot on his lung. TR at 22. Thus, the record demonstrates that the Claimant sought treatment from Dr. Sandoval because he was informed the x-ray showed a spot on his lung rather than because he was experiencing physical difficulties or functional limitations at work. The Claimant was not under any work restrictions for his pulmonary condition when he accepted the "golden handshake" from the Employer and he admitted on cross-examination that it was a voluntary retirement. TR at 34. In addition, the Claimant stated his lung condition did not prevent him from walking the golf course when he played golf until sometime in 1997 when he began taking a cart. TR at 26. Accordingly, I find that the Claimant voluntarily retired from Electric Boat in December 1995 in order to take advantage of a retirement incentive or "golden handshake" the Employer was offering at that time and not because of any work-related pulmonary condition.

Having determined that the Claimant is a voluntary retiree from his position at Electric Boat, I must now look to Sections 8(c)(23), 10(d)(2) and 2(10), of the Act, 33 U.S.C. 908(c)(23), 910(d)(2) and 902(10), in determining the appropriate compensation benefit. *Rajotte*, 18 BRBS 85. Sections 8(c)(23) lays out the method of compensation for claims for permanent partial disability for voluntary retirees whose occupational diseases did not become manifest until after retirement. Pursuant to Section 8(c)(23) compensation for disability from an occupational disease for which the average weekly wage is determined by Section 10(d)(2), "shall be 66 2/3 per cent of such average weekly wages multiplied by the percentage of permanent impairment," as determined under the A.M.A. guides referred to in Section 2(10). Thus, it is necessary to determine the Claimant's average weekly wage in order to evaluate the compensation benefit.

Section 10(d)(2) of the Act provides two different formulas for determining the average weekly wage for disability claims based upon an occupational disease depending upon whether the "time of injury" occurs within the first year after retirement or occurs more than one year after the retirement.[3] The "time of injury" for a claim for compensation for a disability due to an occupational disease which does not immediately result in disability, is addressed in Section 10(i) of the Act, 33 U.S.C. §910(i). Section 10(i) provides that the "time of injury" is deemed to be "the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability." 33 U.S.C. 810(i). *Leathers v. Bath Iron*

[3] Pursuant to subparagraph (A) of Section 10(d)(2), the average weekly wage for a occupational disease claim for which the time of injury occurs within one year of retirement shall be one fifty-second part of his average annual earnings during the 52-week period preceding retirement. Under subparagraph (B) of Section 10(d)(2), the average weekly wage for an occupational disease claim for which the time of injury is more than one year after retirement is the national average weekly wage at the time of injury.

Works, 135 F. 3d 78 (First Cir. 1999); *Carver v. Ingalls Shipbuilding,* 24 BRBS 243, 246 (1991); *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989); *Coughlin v. Bethlehem Steel Corp.*, 20 BRBS 193 (1988); *Stone v. Newport News Shipbuilding and Dry Dock Company,* 20 BRBS 1 (1987). Disability for retirees whose injury manifests after retirement is defined in Section 2(10) of the Act as "permanent impairment, determined under the guides to the evaluation of permanent impairment promulgated ….by the American Medical Association." In other words, in cases where an employee voluntarily retired prior to the date the injury is manifest, disability is defined as permanent medical impairment as determined under the American Medical Association (A.M.A.) Guides. *Lombardi v. General Dynamics Corp.*, 22 BRBS 323, 326 (1989).

The parties disagree as to the "time of injury" or the date on which the employee became aware of the relationship between the employment, the disease, and the disability. The Claimant contends that he was experiencing "problems with his breathing prior to his departure from Electric Boat" and was "informed of spots on his lung which were reported to the Yard Hospital on his last day of employment" on December 22, 1995. Cl. Br. at 15-16. Therefore, the Claimant asserts that because the "**claim**" occurred within one year of retirement the average weekly wage is calculated under subparagraph (A) of Section 10(d)(2). Cl. Br. at 16, (emphasis in original). In contrast, the Employer asserts that the Claimant did not have a disability until after he retired. In this regard, the Employer states that the first pulmonary function test upon which the permanent impairment ratings are based was performed in February 2001, more than one-year post retirement. Emp. Br. at 6, 19. Thus, the Employer argues that the Claimant was not aware of the relationship between the employment, the disease and the disability until the impairment rating was assessed on February 21, 2001, following the pulmonary function test. Therefore, the Employer argues that the average weekly wage must be determined under subparagraph (B) of Section 10(d)(2).

Days before his retirement, the Claimant was informed by medical personnel at the shipyard that he had a spot on his lung and he was advised to consult his personal physician. The Claimant saw Dr. Sandoval in early 1996 and was informed that he had pleural thickening as a result of work-related exposure to asbestos. CX 4; CX 6 at 18-20; TR at 24. The medical records do not indicate that the Claimant was experiencing any functional limitations or receiving treatment for a pulmonary condition at that time. The medical records reflect that Dr. Sandoval referred the Claimant to Dr. Robert Indeglia, in May 1996 for consultation. CX 5 at 16. Dr. Indeglia reviewed CT scans and recommended a repeat scan in three months. Dr. Indeglia also stated that if the repeat scan showed an increase in the area of pleural thickening he recommended a biopsy. The records do not reflect any further treatment for a respiratory condition until the Claimant consulted Dr. Hebert in 2001. TR at 28. Although the claimant testified that just prior to his retirement in 1995 he learned of a spot on his lung and consulted his physician and that he experienced shortness of breath, he did not leave the shipyard as a result of physical limitations, nor had he experienced a decline in his activities at that point. I note that the Claimant testified that he was able to walk the golf course while playing golf until some time in 1997, when he began taking a cart. The Claimant testified that he continued to coach little league baseball until 1998. In December 1995 and early 1996 the Claimant was aware that he had spot on his lung and that it was caused by exposure to asbestos at the shipyard. However, the Claimant's condition at that point was not disabling, he continued his regular activities and

no permanent impairment rating had been assessed. See *Carver, supra, 24 BRBS at 246 (* a voluntary retiree may not be charged with awareness until he knows that a permanent impairment exists). I find that the Claimant first became aware of the relationship between the employment, the disease, and the disability on February 21, 2001, the date the pulmonary function test was performed and a permanent impairment rating was assigned. Therefore, the "date of injury" under Section 10(i) is February 21, 2001. As I have found that the date of injury is more than one year after the Claimant's retirement, his average weekly wage is calculated under subparagraph (B) of Section 10(d)(2). Accordingly, the national average weekly wage is used in calculating the Claimant's compensation benefit.

In determining the Claimant's compensation rate under Sections 8(c)(23) of the Act, it is necessary to evaluate the extent of permanent impairment. The Claimant's expert, Dr. Hebert, assessed an impairment rating of 25% of the whole person. CX 12 at 10, 17. She acknowledged when pressed by the Claimant's counsel that the pre-medication values of the pulmonary function test indicate the Claimant has an impairment rating in the 25-50% range. CX 12 at 11. On this basis, the Claimant contends that he has "at least a 50% impairment of his lung function based on A.M.A. Guidelines and on the pulmonary functional capacity test results prior to the administration of bronchodilators." Cl Br. at 10. The Employer contends that the rating is properly determined on test results after the administration of bronchodilators and not on test results prior to the use of bronchodilators. Emp. Br. at 15, 19. The Claimant's position is without merit. His own expert, Dr. Hebert, testified that the A.M.A. Guidelines for establishing the degree of impairment use post-medication values. Dr. Hebert explained that the reason post-medication values are utilized is "because if there is a component of reversible airway obstruction" one would want "to maximally treat[]" that "before you determine what is permanent disability." CX 12 at 14-15. The A.M.A. Guides are used to evaluate permanent impairment. Under the Act, permanent impairment ratings are used to compensate individuals for permanent loss of use of the bodily part of organ. If a portion of an individual's impairment can be successfully treated and the adverse effects minimized or eliminated with medication, that portion of the impairment is not irreversible and should not be considered in assessing the degree of permanent impairment. Under the circumstances presented here, the credible evidence, read fairly, indicates that Dr. Hebert assessed a 25% impairment of the Claimant's lung.

The Employer's experts, Dr. Kern and Dr. Teiger assess a permanent impairment of 10-15% for the Claimant's lung disease. The Employer argues that the ratings of the three physicians should be averaged (12.5%, 12.5% and 25%) for a final rating of 16.67% permanent impairment. Emp. Br. at 19. In attempting to reconcile the ratings of the Employer's experts with the rating of Dr. Hebert, I note that the AMA guides indicate that the clinical status of the individual along with the diagnostic test results are to be considered in assessing a permanent impairment rating. Dr. Hebert as the treating physician has had a greater opportunity to assess and evaluate the Claimant's clinical picture over time, whereas Dr. Teiger examined the Claimant only once and Dr. Kern never examined the Claimant. The Claimant testified credibly that he is now experiencing some functional limitations as a result of his respiratory condition. The Claimant stated that he cannot walk very far without experiencing shortness of breath, since 1997 he has been unable to walk the golf course when he plays and must instead take a cart, he was forced to give up coaching little league as he could no longer run with the kids, in his part-time job as groundskeeper his activity is limited to riding the mower to cut the grass and he is

unable to perform the more strenuous aspects of the job, and finally, he is unable to push his lawn mower at home for more than five minutes before he must stop and rest. TR at 26-27, 29, 30-32. The Claimant also testified that he has used inhalers on a daily basis for the last couple of years. TR at 29. Thus, the Claimant is now experiencing some restriction of his activities as a result of his respiratory impairment. While it is reasonable to average the impairment ratings of the three physicians who assessed permanency ratings, in light of the Claimant's diagnostic test results, his present clinical condition, and the higher rating assessed by his treating physician, I find that using the higher end of Dr. Teiger's and Dr. Kern's permanency ratings more accurately reflects the Claimant's current permanent impairment. Averaging the 15% ratings by both Dr. Kern and Dr. Teiger, along with Dr. Hebert's 25% rating, results in an impairment rating of 18.33%. The national average weekly wage in February 2001 was $466.91. Applying Section 8(c)(23), the Claimant's compensation is determined by taking 66 2/3 of the national average weekly wage of $466.91 to arrive at a the weekly compensation rate of $311.27, multiplied by 18.33%, results in a weekly compensation benefit of $56.96. *Mazze v. Frank J. Holleran, Inc.* 9 BRBS 1053, 1055 (1978); *Peterson v. Washington Metro. Area Transit Auth.*, 13 BRBS 891, 897 (1981).

The Employer's final contention is that even if the undersigned were to determine that the Claimant is entitled to compensation under Sections 8(c)(23) and 10(d)(2)(B), the Claimant would, nevertheless, not be entitled to any compensation benefits because his seasonal employment as groundskeeper at a golf course establishes that he is not retired. Emp. Br. at 7-9, 17-18. The Employer acknowledges that a retiree is permitted to engage in part-time work to supplement his retirement income, but argues that the Claimant's part-time, seasonal work at the golf course is not supplemental and, in fact, demonstrates that the Claimant is in the workforce, citing *Jones v. US Steel Corp.*, 22 BRBS 229 (1989). Therefore, the Employer contends that the Claimant is not entitled to any benefits under Sections 8(c)(23) and 10(d)(2) because his seasonal employment as a groundskeeper at the golf course establishes that he is not retired. Emp. Br. at 7. Pursuant to 20 C.F.R. 702.601, retirement is defined to mean that "the claimant…has voluntarily withdrawn from the workforce and that there is no realistic expectation that such person will return to the workforce." In *Jones*, the employee had retired and some months later began a part-time position in which he earned $1700 over a four month period. The Board determined that under the regulations defining retirement, 20 C.F.R. 702.601(c), an individual "can have some earnings without being part of the workforce" and held that "part-time work to supplement retirement income does not necessarily defeat the contention that the worker is retired within the meaning of the Act." 22 BRBS at 232. The Board concluded that Mr. Jones' part-time position was not a return to the workforce as contemplated by the regulation sufficient to revoke his retiree status.

In the present case, the Employer asserts that the Claimant's ongoing, part-time, seasonal job as groundskeeper at a local golf course where he works driving the mower from late March to Thanksgiving generates income that is more than supplemental and places the Claimant in the workforce. Emp. Br. at 7. The Claimant earned $10,566.47 in 2002 from his groundskeeper position, where he works four days and 25-28 hours each week. CX 7; TR at 30. His retirement income in 2002 from Social Security and his Electric Boat pension totaled $25,239. CX 8 and 9. The Claimant testified that he works part-time and for only part of the year. He stated that his groundskeeper position gives him something to do, and it allows him to play golf for free. TR at

30-32, 36. He also testified that he now works at Fenner Hill Golf Course because he can earn more money than he earned at the Richmond Golf Course. TR at 36. He stated he is unable to perform the more strenuous aspects of the groundskeeper position and that the management at Fenner Hill accommodates his limitations by allowing him to mow the fairways using a large riding mower. Id. Under the Board's *Jones* decision, an individual "can have some earnings without being part of the workforce." 22 BRBS at 232. The Board found that Mr. Jones' earnings of $1700 was an amount sufficient to suggest the part-time position was merely a means of supplementing his retirement benefits without affecting his entitlement to those benefits. The Board held that part-time work to supplement retirement income does not necessarily mean that the individual is in the workforce. Id. I note that the Board's *Jones* decision holding that Mr. Jones' earnings in the amount of $1700 from part-time employment did not place him back in the workforce, but rather, supplemented his retirement income was decided fifteen years ago. In the case before me, the Claimant's groundskeeper work is both part-time and seasonal. The Claimant's intention to supplement his retirement income with his part-time earnings at the golf course job is demonstrated by his action in moving to the higher paying Fenner Hill job. In addition, the Claimant is unable to perform the full range of groundskeeper duties and he is allowed to perform only the aspects of the job of which he is physically capable. Under these circumstances, the Claimant's part-time, seasonal groundskeeper position supplements his retirement income. I find that his part-time employment is not a return to the workforce as contemplated by the regulation defining retirement Accordingly, as discussed earlier, the Claimant is entitled to a weekly compensation benefit of $56.96 under Section 8(c)(23) of the Act.

D. Entitlement to Medical Care

An employer found liable for the payment of compensation is additionally responsible pursuant to Section 7(a) of the Act for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. 33 U.S.C. § 907; *Colburn v. General Dynamics Corp*., 21 BRBS 219, 222 (1988); *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (979). A Claimant establishes a prima facie case for compensable medical treatment where a qualified physician indicates that treatment was necessary for a work-related condition. Dr. Hebert has treated the claimant for his work-related respiratory impairment. Accordingly, I find that the Claimant is entitled to medical care for treatment of his work-related injuries and that the Employer is responsible to provide medical care pursuant to section 7.

E. Compensation Due and Interest

Based on the foregoing findings, the Claimant is entitled to a scheduled award for permanent partial disability compensation pursuant to Section 8(c)(23)) of the Act from February 21, 2001 to the present and continuing for a 18.33% permanent respiratory impairment. Since the Claimant's compensation payments are overdue, interest shall be added to all unpaid amounts. The appropriate interest rate is the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982) which is periodically changed to reflect the yield on United States Treasury Bills. *Grant v. Portland Stevedoring Company*, 16 BRBS 267, 270 (1984) *modified on reconsideration*, 17 BRBS 20 (1985). My order incorporates 28 U.S.C. §1961 (1982) by reference and provides for its specific administrative application by the District Director. The

appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

F. Attorney Fees

Having successfully established his right to compensation, the Claimant is entitled to an award of attorney fees under section 28 of the Act. *American Stevedores v. Salzano* 538 F. 2d 933, 937 (2nd Cir. 1976). In my order, I will allow the Claimant's attorney 30 days from the date this Decision and Order is filed with the District Director to file a fully supported and fully itemized fee petition as required by 20 C.F.R. § 702.132, and the Respondents will be granted 15 days from the filing of the fee petition to file any objection.

III. ORDER

Based on the foregoing findings of fact and conclusions of law and upon the entire record, the following order is entered:

1. The Employer, Electric Boat Corporation, shall pay to the Claimant, Lawrence Bestwick, permanent partial disability compensation for respiratory injury pursuant to 33 U.S.C. §908(c)(23), from February 21, 2001 to the present and continuing at a weekly rate of $56.96, plus interest on all unpaid compensation at the Treasury Bill rate applicable under 28 U.S.C. 1961 (1982), computed from the date each payment was originally due until paid;

2. The Employer shall provide the Claimant with such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related respiratory condition may require pursuant to 33 U.S.C. §907;

3. The Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition pursuant to 20 C.F.R. §702.132(a), sending a copy thereof to counsel for the Employer who shall then have fifteen (15) days to file any objection;

4. All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

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COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts